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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 1000

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
AND AS ADMINISTRATRIX, ETC., RESPONDENT.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Atlantic Coast Line Railroad Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit (No. 6617) entered on March 31, 1933 (R. 93), reversing four certain judgments of the United States District Court for the Southern District of Florida (Nos. 2730, 2731, 2732 and 2734) dismissing the complaints herein upon

the merits, with costs, after the direction of verdicts in favor of the defendant (R. 46-49).

Five actions, consolidated for trial in the lower court and heard in the Circuit Court of Appeals on the record in the consolidated cause, were brought by the respondent:

No. 2733. (*a*) As widow, to recover for the death of her husband,

No. 2731. (*b*) As surviving parent of Hazel Stringfellow, her minor daughter,

No. 2732. (*c*) As surviving parent of Jack H. Stringfellow, her minor son,

No. 2730. (*d*) By her in her representative capacity as Administratrix of the Estate of Hazel Stringfellow, and

No. 2734. (*e*) As administratrix of the estate of Jack H. Stringfellow.

The actions having been originally brought in the State court and removed to the Federal court by the defendant railroad company upon the ground of diversity of citizenship, where amended declarations were filed and issues made.

The causes were, by order of the trial court, consolidated and tried together, before the Honorable Alexander Akerman, District Judge, and a jury, upon the evidence submitted by both parties, resulting in directed verdicts for the defendant, petitioner here, in each of said causes (R. 88).

From such judgment appeal was taken by the respondent, *in forma pauperis*, to the United States Cir-

cuit Court of Appeals for the Fifth Circuit (R. 50) which, after hearing, affirmed the judgment of the District Court in cause No. 2733, being the action seeking to recover damages for the death of plaintiff's husband, and reversing and remanding causes Nos. 2730, 2731, 2732 and 2734, being the actions in which the plaintiff sought to recover in her personal right and also as administratrix for the death of her deceased minor children (R. 93-103). Petitioner filed petitions to rehear in those cases (R. 109) in which the Court of Appeals reversed and remanded said cause, and respondent likewise filed a petition to rehear (R. 106-109) in that cause in which the Court of Appeals affirmed the judgment of the lower court. Both petitions to rehear were denied by the Circuit Court of Appeals (R. 116). On motion of respondent, and with the consent of petitioner, an order of severance was entered in the cause of Sarah Elizabeth Stringfellow, a widow, in her own right, as widow, No. 2733, from all of her co-appellants for the purpose, as stated in the order, of filing a petition in the Supreme Court of the United States for writ of certiorari (R. 115).

A stay of the mandate was entered on the application of appellant (R. 118) and, likewise, a stay of the mandate was entered on application of the appellee (R. 119). The opinion of the Circuit Court of Appeals and the dissenting opinion of the Circuit Judge Hutcheson have not been officially reported.

These causes are typical grade crossing cases, the accident happening in the daytime upon a straight track, the view of which was only partially obstructed. Petitioner's motion for a directed verdict in the Dis-

trict Court was based upon want of evidence sufficient to establish the causes of action relied upon, in that:

(*a*). There was no evidence upon which a verdict for the plaintiffs could be predicated;

(*b*). It was shown by the undisputed evidence that the proximate cause of the accident and injury was due to the negligence of the driver of the vehicle to exercise any precaution before going upon the track;

(*c*). That the evidence conclusively shows that the driver of the vehicle as he approached the crossing failed to stop, but did look in the direction from which the train was approaching, at a point where the approaching train could have been seen, and then speeded up attempting to beat the train across (R. 88).

The only assignment of error pressed in the Circuit Court of Appeals in support of respondent's appeal questioned the propriety of the directed verdict for the defendant at the conclusion of the entire case (R. 51-53). There were assignments of error directed to the rejection and admission of evidence, but as we understand were not pressed in the Court of Appeals and were ignored by that Court in its opinion and judgment.

The Circuit Court of Appeals predicated its action in affirming the judgment of the District Court in No. 2733 on the theory that the sole proximate cause of the accident was the negligence of the driver of the vehicle, but, notwithstanding this, held that the right of recovery for the deaths of the children should have been submitted to the jury, and that the jury might reason-

ably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company (R. 96).

In the dissenting opinion by Mr. Justice Hutcheson it is stated that:

> "The opinion of the majority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributorily negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be."

However, the opinion of the majority does not bear out this construction, which we concede is without warrant in the Florida statute or in any of its decisions.

The contention of your petitioner is:

(A.) THAT THE CIRCUIT COURT OF APPEALS, HAVING FOUND THAT THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, RESULTING IN THE DEATH OF RESPONDENT'S HUSBAND, THE DRIVER OF THE VEHICLE, WAS THE DRIVER'S NEGLIGENCE, IT NECESSARILY FOLLOWS THAT THE DEATH OF RESPONDENT'S MINOR CHILDREN WAS BROUGHT ABOUT BY THE SAME ACT OF RESPONDENT'S HUSBAND, THE DRIVER OF THE CAR, WHICH ACT LIKEWISE MUST BE TAKEN AS A MATTER OF LAW AS THE SOLE PROXIMATE CAUSE OF THEIR DEATH; OR

(B.) IN THE EVENT THE OPINION OF THE MAJORITY OF THE CIRCUIT COURT OF APPEALS, IN AFFIRMING THE ACTION OF THE DISTRICT COURT IN SO FAR AS THE CAUSE OF THE DEATH OF RESPONDENT'S HUSBAND IS CONCERNED, AND REVERSING SAID CAUSES IN SO FAR AS THE DEATH OF RESPONDENT'S MINOR CHILDREN IS CONCERNED, IS BASED UPON THE CONSTRUCTION PLACED THEREON BY THE DISSENTING OPINION OF CIRCUIT JUDGE HUTCHESON, SUCH CONSTRUCTION IS UNTENABLE UNDER THE STATUTES AND DECISIONS OF THE STATE OF FLORIDA AND IS BASED UPON A SUPPOSITITIOUS STATEMENT OF FACTS IN CONFLICT WITH THE ACTUAL FACTS AS DISCLOSED BY THE RECORD.

Summary Statement of the Matter Involved.

Assuming, as we insist must be done, that the District Court and the Circuit Court of Appeals have found from all of the evidence that as a matter of law the sole proximate cause of the accident was the negligence of the driver of the car, it follows that every result flowing from said accident must be attributed to the same sole proximate cause. A contrary holding would bring this cause clearly within the rule laid down as to the discretionary jurisdiction of the Supreme Court under sub-paragraph B of Paragraph 5 of Rule 38 of this Court, in that said Circuit Court of Appeals "has decided an important question

of general law in a way probably untenable or in conflict with the weight of authority".

On the other hand, if it be assumed that the Circuit Court of Appeals based its action in reversing these four cases, sought to be brought up by certiorari, on the theory, as suggested by the dissenting opinion of Circuit Judge Hutcheson, that the cause of this accident, resulting in the death of the three persons, was the result of the concurring negligence of respondent's husband, the driver of the vehicle, and of the petitioner, the railroad company, and that while such a concurrent negligence of respondent's husband, the driver of the vehicle, would defeat her right of recovery in so far as his death is concerned, it would not defeat the respondent's right of recovery in so far as the deaths of her minor children were concerned, then this construction would clearly bring this cause within the discretionary jurisdiction of this Court by virtue of subparagraph B of Paragraph 5 of Rule 38 of this Court, in that the Circuit Court of Appeals would have decided an important question of local law in a way probably in conflict with applicable local decisions and that such a holding in view of the record in this case could only be based upon a supposititious statement of facts in conflict with the actual facts as disclosed by the record.

A mere statement of the question involved under the first assumption, to-wit: Does the sole proximate cause of an accident carry with it every result flowing therefrom? is its own answer and needs no citation of authority. An answer contrary to petitioner's conten-

tion could only result from a confusion of the words "cause" and "effect."

On the contrary, if the holding of the majority of the court is predicated upon the construction placed thereon by the dissenting opinion of Circuit Judge Hutcheson, this holding is in conflict with the statutes of the State of Florida and applicable local decisions (Compiled General Laws of the State of Florida for the year 1927, paragraph No. 7052; *A. C. L. R. R. Co.* v. *Watkins*, 97 Fla. 350, 121 Sou. 95) and such holdings can only be justified by a supposititious statement of facts in conflict with the actual facts as disclosed by the record.

Predicating the action of the Circuit Court of Appeals upon the construction placed thereon by the dissenting opinion of Circuit Judge Hutcheson, it is necessary briefly to review the evidence adduced (*Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458).

A number of witnesses testified as to the speed of the train, varying from twelve miles an hour to fifty miles an hour, and, likewise, a number of witnesses testified "pro and con" as to the ringing of the bell or the blowing of the whistle, but the view of your petitioner is that none of these acts was, or could be, considered as a proximate cause of the accident. The opinion of the majority of the court as to the statement of the facts does not reflect the facts as shown by the record.

(1) On page 3 of the printed decision of the court (R. 94) it is said:

> "The fireman testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer who immediately put on the emergency brakes."

This is erroneous in that the fireman testified as follows:

> "I was sitting on my side and I got down about thirty or forty feet from the crossing and saw this car coming up about the same distance from the crossing and went right in front of the engine, and I jumped up and holloed to him to put on the emergency."
>
> "I holloed to the engineer, warning him of the danger when the engine was about thirty to sixty feet from the crossing."

Again, on cross-examination, the witness testified:

> "I told the engineer when we were about thirty to sixty feet before we got to the crossing. * * * When I first saw the automobile, it was about the same distance that we were from the track. I couldn't tell whether the automobile was going to stop" (R. 67-68).

In other words, this witness testified that when he, the fireman, was between thirty and sixty feet from the point where the accident happened, he saw this automobile coming, and it was about the same distance, to-wit, thirty to sixty feet from the point of the accident. No witness testified that the automobile was on the crossing sixty feet in front of the engine.

(2) On page 3 of the printed opinion of the court (R. 95) it is said:

> "but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

There is not a line of evidence that he stopped.

The plaintiff introduced one person, who claimed to be an eye-witness, a Mrs. Crystal Towne, who said she was about one hundred and fifty feet from the railroad track, and says that she saw the train strike the car (R. 62). This witness did not state, even by any inference, that the automobile stopped, or that she saw it, other than at the very moment of the collision.

The other eye-witnesses were Mrs. Mabel Seeley, who testified that he did not stop, but that he slackened his speed a little, and he then speeded up across the tracks (R. 71-72).

E. H. Baldwin testified, on direct examination, that he drove right in front of the train, and that as well as he can tell he did not slow up, or stop, from the time he first saw him. On cross-examination, he testified:

> "I know he slackened the speed of his car some, but not very much" (R. 78).

Ray Outman, a negro, and an eye-witness, testified that he saw the automobile before it got to the track, and that it did not stop or slacken its speed before it went upon the track (R. 79).

The fireman, A. R. White, testified that from the time he first saw the automobile until the time of the crash, it did not slow up, or stop, or change its speed any (R. 67-68).

Therefore, it cannot be said to be uncertain as to whether or not he stopped. The evidence is uncontradicted that he did not stop.

(3) On page 6, of the printed decision of the court (R. 97) it is said, in differentiating the case of Covington against the Seaboard Air Line Railroad, 99 Fla. 1105, 128 Sou. 426, that

> "It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

The plaintiff introduced one witness, as before stated, who saw only the actual impact, but the defendant introduced a witness, Mabel L. Seeley, who testified with respect thereto as follows:

> "There is a stop sign in the middle of Scotland Street to the west of the railroad track. * * * He did not stop. He slackened his pace a little bit."

She was then asked:

> "Q. State whether or not the driver of this automobile looked in the direction from which the train was coming, before he entered upon the tracks.
>
> A. Yes, it appeared to me that he did. He looked toward the train and then made a dash right across.
>
> Q. After he looked in the direction from which the train was approaching, what, if anything, did he do?
>
> A. He seemed to speed up to cross the tracks" (R. 71-72).

And this testimony was corroborated, in part at least, by the witnesses, White and Outman.

It is true, no witnesses testified in exact words that he was racing with the train, but every logical deduction to be gathered from this testimony is that he was so doing, because "he looked toward the train and then speeded up". Of course, he is charged with having seen what was there, and from the fact that he speeded up, it is clearly inferable that he saw the train and was, in fact, racing. Certainly the facts of racing with a train in this case more clearly appeared than in the Covington case.

At the close of all of the evidence in the case petitioner moved for a directed verdict in each case on the ground that there was no proof of negligence on the part of petitioner and no facts from which an inference of negligence could be drawn, showing or tending to show that any act of the petitioner contributed proximately to the accident and injury (R. 88). The district court granted petitioner's motion, using the following language:

> "Gentlemen, between the Supreme Court of the United States and the Circuit Court of Appeals and the Supreme Court of Florida, they have got the judge between the devil and the deep blue sea. The Supreme Court of the United States says that failure to stop, look and listen is negligence. In a case that went up from Ohio, they said that would defeat any recovery. Now the Circuit Court of Appeals, after that decision was rendered, have held that in Florida under this Apportionment statute that it would not necessarily defeat a recovery,

and I think that is the better rule where the evidence shows that the proximate cause of the injury was the negligence of the railroad and that failure to stop, look and listen was only contributory; but if the failure to stop, look and listen is the ultimate cause, then I am satisfied that there can be no recovery. The evidence is practically undisputed and overwhelming that this automobile did not stop. Whether the man looked and listened does not appear but if he did look he did not look to any purpose. There is some talk about the Ford rattling. The probabilities are that the Ford was rattling so that he could not hear anything; that is simply speculation. I cannot put my decision of that. So we come back to the question as to whether the railroad company was negligent.

The Supreme Court of the United States has held that a Georgia statute of which our Florida statute is an exact copy as far as I am advised —I never sat down and compared them—but the statute which casts the presumption of negligence on the railroad company, is unconstitutional and void in the Georgia case.

Now I understand that the Court of Appeals has upheld the Florida statute on account of the different construction given to the statute by the courts of Florida and the courts of Georgia. The courts in Georgia let the presumption go to the jury as evidence to be weighed in connection with the evidence given to rebut the presumption whereas the Florida court holds that it just merely shifts the burden and has no evidentiary effect at all. If the evidence is not produced to overcome the presumption the presumption stays there but where the evidence is

produced to overcome the presumption it loses all of its effect.

Now the Supreme Court has repeatedly held that the court must justify all of the evidence and when you take all of the evidence and consider it as a whole with all reasonable and logical deductions that can be drawn therefrom, a verdict of the jury could not be sustained, it is the duty of the court to direct a verdict.

Now the plaintiff proves enough here to cast the burden on the defendant, and the defendant produced evidence that the bell was rung and the whistle was blown and produced evidence as to a very reasonable rate of speed. Some of the plaintiff's witnesses swore that they heard a whistle. And all that you have to rebut that is the evidence offered by the plaintiff, the three witnesses who put this train running from about fifty and sixty miles an hour and one or two that did not hear the bell. Now that testimony that put it up around fifty or sixty miles an hour just shows that they did not know what they were talking about. If they had put it above thirty they would not know what they were talking about. They stretched it too much; they overreached themselves.

I am clearly of the opinion, taking the evidence as a whole, that the railroad company has carried the burden which is cast upon it to disprove the negligence. I am under my oath as judge to decide one way or the other as it appears to me. I cannot see that there is any negligence here upon the part of the railroad, and that it in any way contributed to this unfortunate accident, therefore you may prepare a verdict in each one of the cases.

Mr. Barton: I desire, of course, to make the same motion for each of the cases.

The Court: Yes.

Contributory negligence is not pleaded and could not be pleaded as to the children anyway. The court is of the opinion that the railroad company has overcome the presumption.

Exception was noted by the plaintiff to the ruling of the Court and to the peremptory instruction.

Thereupon, the jury returned into the court and the court instructed them as follows:

The Court: Gentlemen of the jury, I hope you have been having a better time than I have. You were relieved from listening to the argument for a while and I had to listen to it.

In this court the judge is required to assume some responsibility. He is not a mere referee of a fair fight to sit up here and let the jury pass upon the question and the court has decided that under all of the evidence here as a matter of law that neither of these plaintiffs could recover against the railroad company. This is an unfortunate accident, we all sympathize with the widow, but there are certain rules of law that control these matters and the court is responsible for the administration of these rules of law and you are not, consequently, I direct some one of your number to sign a verdict of not guilty in each one of these cases. That relieves you of all responsibility."

Rulings of the Court Below.

On appeal, as before stated, the Circuit Court of Appeals in the majority opinion affirmed the action

of the District Court in directing a verdict in cause No. 2733, being the action seeking damages for the death of the husband of plaintiff, but reversing and remanding causes Nos. 2730, 2731, 2732 and 2734, being those causes wherein the plaintiff sought a recovery for the death of her minor children in her personal right and as administratrix (R. 93 to 98).

Circuit Judge Hutcheson rendered a separate opinion in which he concurred in the reversal so far as the cases for the death of the children were concerned, but dissented from the opinion of the majority in the affirmance of the case seeking damages for the death of plaintiff's husband (R. 98 to 103).

Reasons Relied Upon for the Allowance of the Writ.

1. If the action and judgment of the District Court, affirmed by the Circuit Court of Appeals, was upon the ground that the sole proximate cause of the accident was the negligence of the driver of the vehicle, it follows as a matter of law that the District Court properly directed verdicts in each of the causes herein sought to be reviewed by certiorari and the judgments of the District Court should not have been reversed by the Circuit Court of Appeals.

2. Any other construction placed upon the opinion and judgment of the Circuit Court of Appeals in reversing the judgment of the District Court could only be based upon an entirely incorrect and erroneous finding of fact on most material matters.

3. The testimony on behalf of respondent upon which the Circuit Court of Appeals reversed the judg-

ment of the District Court is so uncertain, indefinite, conjectural, circumstantial and negative that it cannot under the Federal Rule raise a question of fact upon the material question in the case against the positive testimony of petitioner's witnesses, and, therefore, the Circuit Court of Appeals should not have reversed the judgment directed in favor of petitioner (*Southern Ry. Co.* v. *Walters,* 284 U. S. 190).

4. These three parties, for the death of whom respondent seeks damages, met death in the same accident and said causes were tried upon the same evidence, and, therefore, if the negligence of the father was the sole proximate cause of his death, it must likewise follow that his negligence was the sole proximate cause of the death of the children.

5. In holding that, under the circumstances set forth, the judicial discretion of the Trial Court was improperly exercised in directing a verdict for petitioner and in declining to recognize the superior opportunity of the Trial Court for reviewing the weight of the evidence, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure and by its decision sanctioned such departure in the future on the part of the Trial Courts in the Fifth Circuit as to call for an exercise of this Court's power of supervision (*Patton* v. *Tex. & P. R. Co.,* 179 U. S. 658).

WHEREFORE your petitioner respectfully prays that this petition in these consolidated cases for a writ of

certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit be granted.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation,
By McKINNEY BARTON,
Attorney,
St. Petersburg, Florida.

JAS. R. BUSSEY,
SAM H. MANN, JR.,
McKINNEY BARTON,
Solicitors,
St. Petersburg, Florida.

W. E. KAY,
General Solicitor,
Of Jacksonville, Florida.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 1000

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, PETITIONER,

vs.

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
AND AS ADMINISTRATRIX, ETC., RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

There was no official written opinion by the District Judge. His action in directing a verdict is set forth in the record (R. 88-90).

The opinion of the Circuit Court of Appeals (R. 93-98) and the dissenting opinion (R. 98-103) rendered March 31, 1933, are not yet officially reported.

II.

Jurisdiction.

(1) The statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (*a*), as amended by the Act of February 13, 1925, 43 Stautes, 938 (U. C. Code, Title 28, Sec. 347 (*a*)).

(2) The order of the Circuit Court of Appeals, review of which is sought, was entered on March 31, 1933 (R. 104).

Although the order of the Circuit Court of Appeals is not a final judgment, Section 240 (*a*) of the Judicial Code, as amended, clearly confers discretionary jurisdiction upon this Court to bring up a case of this character from the Circuit Court of Appeals by certiorari and sub-paragraph (*b*) of paragraph 5 of Rule 38 of this Court clearly recognizes such right. Certiorari was allowed by this Court after a judgment was reversed and a new trial ordered in the Circuit Court of Appeals *in Pennsylvania Railroad Company* vs. *Chamberlain,* — U. S. —, 77 Law Ed. 503, decided by this Court February 13th, 1933.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the inter-

ests of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred in holding:

1. That the judgment of the District Court, entered on the directed verdicts for the defendant in causes, Nos. 2730, 2731, 2732 and 2734, should be reversed.

2. That although as a matter of law the sole proximate cause of an accident resulting in the death of three parties was the negligence of one of the parties, to-wit, the driver, yet as to the other two parties the question as to whether there was concurring negligence on the part of the defendant should be submitted to a jury.

3. That there was any evidence from which the jury might have reasonably concluded that the deaths of the children were caused by the combined or concurrent negligence of their father and the Railroad Company.

4. The Circuit Court of Appeals erred in its findings that the automobile was driven upon the crossing sixty feet in front of the engine, that the testimony as a whole leaves it uncertain whether the automobile was stopped or slackened speed when it arrived at the crossing, and whether the driver actually saw the train

and that it did not appear by the record that the driver was racing with the train in an attempt to pass ahead of it over the crossing.

5. That the superior opportunity of the trial judge for reviewing the weight of the evidence is not to be recognized in reviewing the case on appeal.

6. That the trial judge improperly exercised his judicial discretion in directing a verdict for the petitioner.

V.

ARGUMENT.

POINT I.

The Trial Court properly directed verdicts in each of these causes, because, as found by the District Court and concurred in by the Circuit Court of Appeals, the sole proximate cause of the accident resulting in the death of all the parties was the negligence of one of them, to-wit, the driver.

The Circuit Court of Appeals held, in so far as the case depended upon respondent's right to recover for the death of her husband, that it was not error to direct a verdict for the petitioner, and referring to Section 7052 Compiled General Laws of Florida for 1927, being the Statute establishing the Comparative Negligence Rule in the State of Florida, held that no recovery could be had on account of his death, citing the cases: *S. A. L. Ry.* v. *Tomberlin*, 70 Fla. 435, 70 Sou. 437; *Egley* v. *S. A. L. Ry.*, 84 Fla. 147, 93 Sou.

170; *A. C. L. R. R. Co:* v. *Gornto,* 89 Fla. 97, 103 Sou. 117; *F. E. C. Ry.* v. *Davis,* 96 Fla. 171, 117 Sou. 842; *Covington* v. *S. A. L. Ry. Co.,* 99 Fla. 1102, 128 Sou. 426; *Southern Ry. Co.* v. *Mann,* 91 Fla. 948, 108 Sou. 889, as authority for this position.

All these cases, so cited by the court as sustaining this view, are cases dealing with sole proximate cause and holding under facts very similar to the case at bar that the act of the plaintiffs in those various cases was the sole proximate cause. Yet, notwithstanding this finding by the court that as a matter of law the sole proximate cause of the accident was the negligence of the driver of the vehicle, yet, upon the same evidence found in the same record it concludes that so far as the deaths of the children were concerned, the causes should have been submitted to the jury, stating:

> "But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company."

The Circuit Court of Appeals used the language:

> "The children were guilty of no negligence; and their father's negligence could not be imputed to them."

This is undoubtedly true, but we submit that the court has become confused on the question of "imputed negligence". This is evidenced by the citation of the case of *Little* v. *Hackett,* 116 U. S. 366, in which cause the doctrine of imputed negligence as to guests was repudiated.

Point II.

The Trial Court properly directed a verdict in each of these causes because the respondent failed to prove any act of negligence on the part of the defendant as the proximate cause of the accident; on the contrary, all of the evidence shows conclusively that the proximate cause thereof was the negligence of the driver of the vehicle.

In the dissenting opinion of Circuit Judge Hutcheson it is stated that the majority of the court held in their opinion that under the Florida Comparative Negligence Statute that a driver may be so contributory negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his recovery will be barred.

It is respectfully submitted that the opinion of the majority of the Court does not bear this construction, and that such construction is contrary to all of the decisions of the Supreme Court of the State of Florida. The most recent case and most directly in point is the case of *Atlantic Coast Line R. R. Co.* v. *Watkins*, 121 Sou. 95, 97 Fla. 350.

Certainly under the law as it exists in the State of Florida under the Comparative Negligence Statute above referred to if the defendant was guilty of negligence proximately contributing to the accident and the plaintiff was, likewise, guilty of contributory negligence contributing to the accident, even though the plaintiff's negligence was far greater in degree than

that of the defendant, there could be a recovery, but the damages should be diminished in proportion thereto. Par. 7052, Compiled General Laws of Florida for 1927; *A. C. L. R. R. Co.* v. *Watkins*, 97 Fla. 350, 121 Sou. 95.

Assuming for the purpose of argument that the action of the majority of the Circuit Court of Appeals was based upon the construction placed thereon in the dissenting opinion of Circuit Judge Hutcheson, it is our belief that the Circuit Court of Appeals was lead into this error by a supposititious finding of facts not borne out by the record; that instead of the record showing that the automobile was driven upon the crossing sixty feet in front of the engine, as a matter of fact the record shows that when the engine was 30 to 60 feet from the crossing the automobile was at a like distance therefrom and going at approximately the same rate of speed. This is the uncontradicted evidence (R. 67-68).

That instead of the testimony leaving it uncertain whether the driver stopped or slackened his speed when he arrived at the crossing, the evidence is uncontradicted to the effect that he did not stop, but, on the contrary, he slackened his speed slightly and then speeded up to cross the tracks (R. 71-72).

That the finding in the opinion of the majority of the Court that it does not appear that the driver was racing with the train in an attempt to pass ahead of it over the crossing, is erroneous; the uncontradicted evidence is that after he looked in the direction from which the train was approaching, he then made a dash right across the track.

The Court of Appeals in attempting to differentiate the case of *Covington* v. *S. A. L. R. R. Co.*, 99 Fla. 1105, 128 Sou. 416, say that it is a somewhat similar case to the case at bar, but that the driver in that case could have seen the train at a distance of 75 feet from the crossing, whereas in this case the view was much more limited, and that it was fairly inferable from the pleadings in that case that the driver actually saw the train.

The opinion of the Supreme Court in that case, affirming the action of the Lower Court in directing a verdict, based its action upon the fact that the driver of the vehicle not only did not see the train but had not used any precaution to ascertain whether or not a train was coming.

We, therefore, say that an examination of the record requires the conclusion that the evidence on the issue as to the proximate cause of this accident is so conclusive as to justify a direction of a verdict by the Court (*Southern R. R. Co.* v. *Walters*, 284 U. S. 190).

POINT III.

The Circuit Court of Appeals erred in declining to give any weight to the superior opportunity of the trial judge of observing the witnesses and passing on the weight of the evidence.

Under the facts in these cases, when considered in connection with the well-established rule in the Federal court relative to the direction of a verdict, it seems inescapable that the direction of a verdict for petitioner by the District Court was proper. Under

the Federal rule a scintilla of evidence is not sufficient, but there must be reasonable and substantial evidence for the plaintiff before the case can be submitted to the jury and the evidence in favor of the plaintiff must be of such a conclusive and substantial character that if a verdict were rendered for the plaintiff, the Court would not have to set it aside in the exercise of sound judicial discretion. *Pleasants* v. *Fant*, 22 Wall. 116, 122; *St. L. & S. F. R. R. Co.* v. *Mills*, 271 U. S. 344; *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 364, 369; *Herron* v. *Southern Pac. Co.*, 283 U. S. 91.

A scintilla or modicum of conflicting evidence irrespective of the character and measure of that to which it is opposed does not require the submission of the case to the jury. *Small Company* v. *Lamborn & Company*, 267 U. S. 248, 253, and the cases there cited.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant. *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7.

And the evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury. *Atlantic Coast Line R. R. Co.* v. *Davis*, 279 U. S. 34.

The legal effect of the evidence is a question of law. *M. & R. V. Ry. Co.* v. *United States*, 270 U. S. 280, 285.

If petitioner is right in its contention that on the evidence in this case it was the right and duty of the District Court to direct a verdict in its favor, the error of the Circuit Court of Appeals in reversing the judgment may only be corrected by the allowance of this

writ and if not corrected the decision will have the effect of so limiting the powers of the District Courts in this circuit that petitioner and other railroads engaged in interstate transportation will be forced to submit the question of liability in personal injury cases to the decision of a jury in every case where there is the slightest evidence in favor of the plaintiff. This Court said in *Gunning* v. *Cooley*, 281 U. S. 90, 94:

> "Where the evidence upon an issue is all on one side or so overwhelmingly on one side as to leave no room for doubt as to what the fact is, the Court should give a peremptory instruction to the jury."

The importance of preserving the right of a district judge to take a case away from the jury if the evidence under the Federal rule does not warrant its submission cannot be overestimated and is a matter of the gravest public interest to litigants generally in this circuit. As was said by this Court in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660:

> "At the same time, the judge is primarily responsible for the just outcome of a trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity as jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict

> save in the favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, this Court said (p. 459):

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

We contend that the principle of these cases has not been applied by the Circuit Court of Appeals in this case.

Conclusion.

FOR THE REASONS STATED IN THE PETITION AND THIS BRIEF IT IS RESPECTFULLY SUBMITTED THAT THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Jas. R. Bussey,
Sam H. Mann, Jr.,
McKinney Barton,
Counsel for Petitioner,
St. Petersburg, Florida.

W. E. Kay,
General Solicitor,
Jacksonville, Florida.